

BEFORE THE FEDERAL ELECTION COMMISSION

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COMMISSION
SECRETARIAT

Nov 3 4 13 PM '98

In the Matter of)

MUR 4583

Embassy of India and Davendra Singh)

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

Based on information obtained through a *sua sponte* submitted by the Indian-American Leadership Fund and from a Department of Justice ("DOJ") investigation and prosecution, the Federal Election Commission ("Commission"), on November 12, 1996, found reason to believe that the Embassy of India and Davendra Singh ("Respondents") knowingly and willfully violated 2 U.S.C. §§ 441e and 441f.

The United States Department of State ("State Department") became aware of this matter when the Embassy of India sent it a copy of the Commission's reason to believe notification. The State Department then notified the Commission of the embassy's action and suggested that because of foreign government involvement, the Commission might want to coordinate this matter with the State Department. From the beginning of this matter, the embassy has taken the position that pursuant to the Vienna Convention on Diplomatic Relations of 1961, the embassy and its diplomatic agents "are not subject to the legal process of the receiving State" and that the embassy would not interact or correspond with the Commission except through the State Department.¹ Although this Office and the State

¹ Article 31 of the Vienna Convention on Diplomatic Relations provides that, with certain exceptions, a diplomatic agent is immune from the criminal and civil jurisdiction of the receiving state's courts, and "is not obliged to give evidence as a witness." The Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (ratified by the United States in 1972).

Department agreed that it was not necessary for the State Department to be involved during the investigation of this matter, the State Department offered its services to encourage the embassy to cooperate voluntarily with the Commission's investigation and to transmit correspondence to and from the embassy and the Commission. Since that time, the State Department has helped transmit correspondence and has contacted embassy officials to encourage them to cooperate on this matter. This Office has kept the Commission informed of its correspondence with the embassy and discussions with the State Department. See General Counsel's brief ("GC Brief") and previous Memoranda and General Counsel's Reports to the Commission.

After conducting an investigation, the General Counsel's Office sent a probable cause brief to Respondents. See GC Brief dated June 30, 1998. The Respondents received the GC Brief on July 22, 1998. To date, the Respondents have not responded to the GC Brief.² Attachment 1. Indeed, the embassy has never provided any useful information or documentation regarding this matter despite its promises to voluntarily cooperate with the Commission's investigation and this Office's efforts through correspondence to the embassy and through discussions with the State Department to have the embassy address the issues in the Factual and Legal Analysis.

² The General Counsel's Brief as well as all previous notifications and correspondence in this matter have been addressed to the Embassy of India in Washington, D.C. This Office has received correspondence from officials at the embassy but has never heard directly from former Minister Davendra Singh (Minister Singh apparently left the United States some time in 1995). In a letter, the embassy stated that Minister Singh had not been notified of this matter. Thus, it appears that the embassy never forwarded the Commission's notification and correspondence to Minister Singh.

II. ANALYSIS

An analysis of the violations in this matter is contained in the GC Brief. The factual and legal analysis set forth in the GC Brief is incorporated as if fully set forth herein.

As set out in the GC Brief, public court documents in the Department of Justice prosecution of Lalit Gadhia and information obtained by this Office during its investigation of this matter reveal that Davendra Singh, the then Minister for Personnel and Community Affairs and an intelligence officer at the Embassy of India in Washington, D.C., initiated a reimbursement scheme in which he supplied up to \$60,000 to Lalit Gadhia for the purpose of channeling the money to candidates in the 1994 federal elections, which funds were used to reimburse numerous individuals for campaign contributions to various political committees.³ The GC Brief discusses the bases for the inference that the money Minister Singh supplied to Mr. Gadhia came directly or indirectly from the Government of India and for the conclusion that Minister Singh's activities in the reimbursement scheme were undertaken within the scope of his authority as Minister for Personnel and Community Affairs and, therefore, as agent for the Government of India. See GC Brief pages 7-10. Finally, the GC Brief lists the

³ The activities in question occurred four years ago in 1994, but the Commission's investigation in this matter did not begin until 1996, after the DOJ had concluded its criminal investigation and prosecution of Mr. Gadhia. Subsequently, the Commission, in MUR 4582, investigated Mr. Gadhia, several solicitors, and the numerous conduits involved in the reimbursement scheme. The Commission eventually settled the matter with conciliation agreements and civil penalties from several of the solicitors, sent admonishment letters to the conduits, and found probable cause to believe but took no further action against Mr. Gadhia. MUR 4582 closed in March 1998. At the same time it was investigating MUR 4582, the Commission, in MUR 4583, was attempting to obtain information from the Embassy of India and Minister Davendra Singh regarding their roles in this matter. Because of the difficulties in seriously engaging the Government of India and the embassy's delay in responding and lack of cooperation in this matter, the investigation in MUR 4583 was further delayed and this matter remains pending.

elaborate efforts undertaken by Minister Singh to mask the source of the funds and concludes that these factors serve as a basis for "knowing and willful" violations. See GC Brief pages 8-9.

Foreign nationals and foreign states are specifically prohibited under 2 U.S.C. § 441e from making political contributions and participating in or controlling the election-related activities of a person or organization.⁴ The means used by the Embassy of India to further its interests with the U.S. Congress were illegal. Its activities were also in violation of 2 U.S.C. § 441f which prohibits the making of contributions in the name of another or assisting others in the making of such contributions.

In light of the foregoing, the General Counsel's Office recommends that the Commission find probable cause to believe that the Embassy of India and Davendra Singh knowingly and willfully violated 2 U.S.C. §§ 441e and 441f.

III. DISPOSITION

The Act provides that upon finding probable cause to believe a violation has occurred, the Commission is statutorily obligated to enter into conciliation negotiations with the respondent. 2 U.S.C. § 437g(a)(4)(A)(i). Notwithstanding this provision, the Commission may also refer knowing and willful violations directly to the Department of Justice for

⁴ On October 9, 1998, in challenges to an indictment in one of the pending Department of Justice Campaign Financing Task Force prosecutions, the US District Court for the District of Columbia ruled that the section 441e prohibition is limited to federal elections. *United States v. Yah Lin "Charlie" Trie*, Crim No. 98-0029-1 (PLF), slip op. 7-9 (D.D.C. Oct. 9, 1998). While this district court decision is inconsistent with the Commission's long-standing and consistent interpretation of section 441e based on its language, structure, and legislative history, see 11 C.F.R. § 110.4(a)(1), and is open to serious question, it has no bearing on this matter because the foreign government funding of U.S. elections at issue in this case only involved federal political committees and candidates.

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criminal prosecution. 2 U.S.C. § 437g(a)(5)(C). Several factors point to a referral to DOJ of these knowing and willful FECA violations rather than pursuing Post-Probable Cause Conciliation as the best course of action in this matter. These are, first, the seriousness and knowing and willful nature of the violations; second, the resources required to pursue this matter in light of the foreign government respondent, certain difficulties in the factual record, and the legal issues involved; and, third, DOJ's familiarity with this matter having already investigated and prosecuted Mr. Gadhia for activities related to this matter.

First, contributions in the name of another and foreign national contributions are serious violations of the Act. These violations involve deception in the use of straw donors to hide foreign contributions and to evade contribution limits. The seriousness of these violations is evidenced by the prosecution under U.S. criminal laws of Mr. Gadhia, the U.S. citizen most responsible for this scheme. This matter is particularly serious and sensitive because of the knowing and willful nature of the violations and because of the involvement of a foreign government in the making of up to \$60,000 in illegal contributions to U.S. federal elections.

Second, the Commission's further pursuit of this matter through its civil process would prove to be particularly resource-intensive. The respondents are an uncooperative foreign government and a foreign diplomat who has left the country.⁵ There are unanswered questions in the factual record regarding the involvement of the embassy and the actual

⁵ Minister Davendra Singh left the United States some time ago and he was not available for questioning. It also appears that Minister Singh is largely out of reach for purposes of any U.S. criminal or civil process not only because he is no longer in the United States and might be hard to locate or contact but because he was a diplomatic agent acting in an official capacity when these activities occurred and thus would benefit from the various immunities afforded to diplomats.

source of the money.⁶ Exploring the source of the money would be difficult, particularly as Minister Singh was also an intelligence officer at the time the activities in question occurred which suggests that the money he supplied to Mr. Gadhia most probably came from hidden government sources. Further, as next discussed, litigating these violations against a foreign government would raise legal issues involving the Foreign Sovereign Immunities Act ("FSIA").

Although the embassy did not raise the FSIA in its responses, it would probably do so if faced with a civil suit.⁷ The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, provides that foreign governments are immune from suit in U.S. courts unless the claim falls within one of the Act's enumerated exceptions. The Act's "commercial activity" exception provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—in which the action is based upon commercial activity ... by the foreign state ..." 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct, or a particular commercial

⁶ As explained in the GC Brief and in previous memoranda and reports, the Commission has made repeated attempts through informal requests to obtain a response from the Embassy of India regarding the matters raised in the Factual and Legal Analysis. The embassy, however, never provided any useful information or documentation.

⁷ Some courts have addressed whether the FSIA's provisions apply to criminal proceedings. Section 1330(a) of the FSIA provides that district courts have original jurisdiction "of any nonjury civil action against a foreign state ... with respect to which the foreign state is not entitled to immunity ... under sections 1605-1607 of this chapter." In *Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd.*, 750 F.Supp. 838 (N.D. Ohio 1990), the district court concluded that because the FSIA confers only civil jurisdiction, U.S. courts were precluded from exercising criminal jurisdiction over foreign states. By contrast, the district court in *United States v. Herndon*, 813 F.Supp. 973 (E.D.N.Y. 1993), held that immunity from jurisdiction under the FSIA applied only to civil proceedings and that any criminal activity having a direct effect inside the U.S. was within the jurisdiction of the laws of the U.S.

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transaction or act.” 28 U.S.C. § 1603(d). The statute further provides that the commercial character of an act by a foreign government is to be determined by reference to its “nature” rather than its “purpose.” The test courts have used to determine if the conduct is public or commercial is whether it could be performed by a private person. *See, e.g., Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). Thus, if a private person could have engaged in the same type of activity, then the activity is ‘commercial,’ and sovereign immunity is not an obstacle to suit. *See Rush-Presbyterian-St. Luke’s Medical Center v. Hellenic Republic*, 877 F.2d 574, *cert. denied*, 493 U.S. 937 (1989).

In MUR 2892, one of the numerous respondents in this matter the Coordination Counsel for North American Affairs (“CCNAA”), was an instrumentality of the government on Taiwan.⁸ The CCNAA made contributions to a U.S. mayoral campaign. The CCNAA argued that as an instrumentality of a foreign sovereign it was entitled to the immunities under the FSIA. The Commission took the position that the CCNAA was not entitled to immunity because the making of campaign contributions was indistinguishable from an activity undertaken by a private individual. The CCNAA’s contributions thus met the “private person” test, and so constituted “commercial activity” for purposes of the FSIA. The analysis also argued that Section 441e of the Act should provide the FEC with jurisdiction over respondent regardless of any provisions of the FSIA because of the Commission’s statutory authority to enforce the prohibition of contributions by foreign nationals, including foreign governments. The CCNAA eventually signed a conciliation agreement that reflected

⁸ As there are no formal diplomatic ties between the United States and the Republic of China (“ROC”) on Taiwan, the ROC operates in Washington from the Taipei Economic and Cultural Representative Office in the United States (TECRO), which facilitates commercial, cultural and other relations between the U.S. and Taiwan.

that it made contributions in violation of Section 441e and which provided for the payment of a civil penalty. Thus, while one foreign government representative has accepted the Commission's position, the FSIA's application to a foreign government's illegal contributions to U.S. elections has never been litigated.

The Department of Justice is already familiar with this matter, having conducted a criminal investigation and prosecution of Lalit Gadhia for these same activities. Although at the time (in 1996), the DOJ apparently decided not to investigate the Embassy of India, it may be more willing and able to do so now given the current attention of the Department of Justice's Campaign Financing Task Force to campaign finance abuses involving straw donors and foreign national contributions, particularly those made by foreign governments.

Given the circumstances described above, this Office recommends that this matter be referred to the Department of Justice for criminal prosecution as provided by 2 U.S.C. § 437g(a)(5)(C).

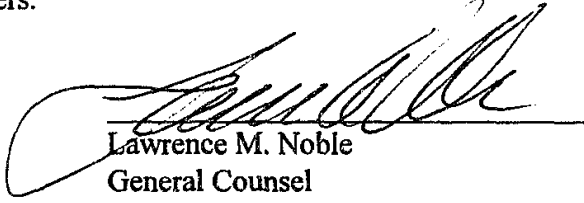
Along with the referral letter, this Office will forward to the Department of Justice the investigative file including the full text of the deposition of Mr. Gadhia, material cited in the GC Brief and copies of the GC Brief. With the closing of MUR 4582, much of the investigative material is already available on the public record. Because the State Department has indicated that some of the documents it sent the Commission should not be further disseminated absent consultation with the State Department, this Office will consult with the State Department before forwarding these documents to DOJ.

IV. RECOMMENDATIONS

1. Find probable cause to believe that the Embassy of India and Davendra Singh knowingly and willfully violated 2 U.S.C. §§ 441e and 441f.
2. Refer this matter to the Department of Justice for criminal prosecution.
3. Approve the appropriate letters.

Date

11/3/98


Lawrence M. Noble
General Counsel**Attachments:**

1. Memorandum from the United States Department of State

Staff assigned: Dominique Dillenseger

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